MALAYSIA MOTOR INSURANCE POOL v. EASTERN MOON ENTERPRISE & ANOR

HIGH COURT MALAYA, GEORGETOWN
LIM CHONG FONG J
[ORIGINATING SUMMONS NO: PA-24NCVC-1017-11-2017]
22 JUNE 2018

INSURANCE: *Motor insurance – Policy – Renewal of policy – Sole proprietor no longer alive when policy was renewed – Whether insurance contract validly procured – Whether there ought to be competent person in existence as insured to procure valid insurance – Whether immaterial that someone else had renewed policy purportedly for deceased – Whether policy null, void and unenforceable – Financial Services Act 2013, para 5 of Sch. 9 – Road Transport Act 1987, s. 96(3)*

This was an originating summons filed by the applicant, an insurance company, for a declaration that the motor vehicle insurance policy was null, void and/or unenforceable pursuant to s. 96(3) of the Road Transport Act 1987. The first respondent was a sole proprietorship owned by the deceased and the second respondent was the rider of a motorcycle. In a suit that was still ongoing, the second respondent sued the first respondent who owned a bus that collided against the second respondent on 2 November 2016. The applicant had renewed the motor insurance policy to the first respondent on 12 November 2015 ('policy') and would be liable pursuant to s. 96(1) of the Road Transport Act 1987 if judgment was entered in favour of the second respondent against the first respondent in the suit. The applicant submitted that the policy was null, void and/or unenforceable because, *inter alia*, the first respondent was no longer alive when the policy was renewed. The second respondent, however, contended that the court must treat that the applicant's objection thereto had been deemed waived pursuant to para. 5 of Sch. 9 of the Financial Services Act 2013.

Held (allowing originating summons with costs):

(1) Paragraph 5 of Sch. 9 applies to consumer insurance contracts on the presupposition that the insurance contract is validly procured in the first instance notwithstanding that there was no express mention of it. This was implicit because it was so fundamental that the parties must have legal capacity in the formation of all contracts as provided in s. 11 of the Contracts Act 1950. Hence, in the context of an insurance contract, there must be a competent person in existence as insured to procure a valid insurance. (paras 22 & 23)

(2) Paragraphs 5(1) and 5(3) of Sch. 9 are only attracted in furtherance of a valid insurance contract to regulate the methodology of communication of risks between the insured and insurer. The object is to enable the insurer to determine the appropriate price and/or terms during the initial procurement and renewal of the insurance respectively. This was a renewal case and hence only attracted para 5.(3) of Sch. 9. (para 23)

(3) The sole proprietor of the first respondent was already dead at the time of the renewal of the policy. It was not a disputed fact that he had died in 2012 but the policy was still renewed on 12 November 2015. Consequently, and since the deceased was already dead at the material time of the renewal of the policy, the first respondent could not therefore lawfully renew it. As a result, it was immaterial that someone else had renewed the policy purportedly for the first respondent. Accordingly, the policy herein was void. (paras 16 & 24)

(4) Paragraphs 5(3) and 5(5) of Sch. 9 of the Financial Services Act 2013 could not be resorted to save the policy notwithstanding that the applicant did not request the first respondent to confirm the deceased was alive before renewing the policy. This was because the policy was already void *ab initio* and not merely voidable where para. 5(5) may be used to prohibit or estop the applicant from avoiding the policy for non-disclosure of other material information. In other words, it was irrelevant that the applicant did not seek to find out from the first respondent whether the deceased was alive or not when the policy was renewed. (para 25)

Case(s) referred to:

Ammetlife Insurance Berhad v. Nandakumar Appu & Anor [2016] 5 CLJ 569 HC ***(refd)***

Chu Chu @ Moksin Amlih v. AM General Insurance (Malaysia) Bhd & Ors [2017] 1 LNS 717 CA ***(refd)***

Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***

Pacific & Orient Insurance Co Bhd v. Lim Poh Ewe As The Representative Of The Estate Of Lim Eng Hock Deceased & Ors [2017] 1 LNS 585 HC ***(refd)***

Leha Jusoh v. Awang Johari Hashim [1977] 1 LNS 59 FC ***(refd)***

Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd [2014] 3 CLJ 421 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 11

Financial Services Act 2013, s. 129, Schedule 9 paras 5(1), (3), (5)

Insurance Act 1996, ss. 150, 151

Road Transport Act 1987, s. 96(3)

For the applicant - Imavathi Subramaniam; M/s Imavathi & Co

For the 2nd respondent - Kernail Singh; M/s Baljit Singh & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Chong Fong J:

Introduction

[1] This is an originating summons filed for a declaration that the motor vehicle insurance policy is null, void and/or unenforceable pursuant to s. 96(3) of the Road Transport Act 1987.

[2] The applicant is an insurance company administered by MMIP Services Sdn Bhd.

[3] The first respondent was a sole proprietorship owned by Arumugam a/l Sokalingam deceased and the defendant in Georgetown Magistrates' Court Suit No. PA-A73KJ-593-07-2017 ("suit").

[4] The second respondent is an individual and the plaintiff in the suit.

[5] In the suit that is still ongoing, the second respondent who was the rider of motorcycle bearing registration no. PDJ 3904 sued the first respondent who owned bus bearing registration no. PCH 4435 that collided against the second respondent on Jalan Semarak Api, Penang on 2 November 2016.

[6] The applicant renewed the motor insurance bearing policy no. 213-021-15-017759 to the first respondent on 12 November 2015 ("policy") and would be liable pursuant to s. 96(1) of the Road Transport Act 1987 if judgment is entered in favour of the second respondent against the first respondent in the suit.

[7] The applicant has instituted this originating summons ("OS") to have the policy declared null, void and/or unenforceable.

[8] The affidavits that were filed for purposes of this OS are as follows:

(i) applicant's affidavit in support affirmed by T. Rajasingham a/l Thalisingam dated 9 November 2017;

(ii) second respondent's affidavit in reply affirmed by Choo Yuen Loy dated 4 December 2017; and

(iii) applicant's affidavit in reply affirmed by T. Rajasingham a/l Thalisingam dated 21 December 2017.

[9] After having read the cause papers and written submissions of the parties, I heard oral arguments of counsel on 20 March and 22 May 2018. I thereafter adjourned my decision to deliberate on the arguments made by counsel.

[10] Now having duly deliberated, I hereby furnish below my decision with the supporting grounds thereto.

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Contentions And Findings

[11] Basically the applicant advanced a twofold line of argument, *to wit* that the policy is null, void and/or unenforceable because the first respondent had already sold the bus to a Ramu a/l Karupiah in 2009 and/or the first respondent was no longer alive when the policy was renewed.

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[12] The second respondent in opposition responded that this court ought not to deal with the point of the sale of the bus by reason that it is still a pleaded live issue in the suit. Otherwise, there would be duplicity in findings on this point. As to the other point that the first respondent was already dead at the material time of the renewal of the policy, the second respondent contended the court must treat that the applicant's objection thereto has been deemed waived pursuant to para. 5 of Schedule 9 of the Financial Services Act 2013.

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[13] In respect of the first point on the prior sale of the bus, the first respondent pleaded as follows in its defence in the suit with emphasis added here:

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> 4. Pihak Defendan sebaliknya menyatakan Arumugam a/l Sokalingam adalah pemilik tunggal syarikat Eastern Moon Enterprise dan bas no. PCH 4435 telah didaftarkan atas Eastern Moon Enterprise. Arumugam a/l Sokalingam telahpun meninggal dunia pada tahun 2012. Sebelum Arumugam a/l Sokalingam meninggal dunia beliau pada tahun 2009 telah menjual bas no. PCH 4435 kepada Ramu a/l Karuppiah (No. 500410-71-5035). Walau bagaimanapun pindaan hakmilik tidak didaftarkan di pejabat Jabatan Pengangkutan Jalan. Pemilik baru Ramu a/l Karuppiah mendapat penyakit "stroke" pada Februari 2015 dan oleh itu bas itu ditinggalkan di bahu jalan sejak Februari 2015 dan diletakkan tanda amaran di belakang bas tersebut. Oleh yang demikian Defendan menafikan bas no. PCH 4435 terlibat di dalam kemalangan dengan Plaintif. Pada Januari 2017 bas tersebut telah dijual kepada pembeli baru. Ramu a/l Karuppiah tidak membuat laporan polis sehingga kini sebab beliau menghidapi penyakit "stroke".

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[14] In the case of *Chu Chu @ Moksin Amlih v. AM General Insurance (Malaysia) Berhad & Ors* [2017] 1 LNS 717 CA, Yeoh Wee Siam J (now JCA) held as follows:

> 27. However, for cases such as the present one, we would caution that the Courts below, in the exercise of their discretionary powers, should refrain from granting prematurely the declaration sought under s. 96(1) and (3) of the RTA. This is because where there is an ongoing suit to determine whether any injured person ought to be covered by the insurance policy, in particular in respect of third party risks, it is for the trial Judge to decide, based on the evidence before him, on issues such as whether the injured person is a passenger, a stranger/pedestrian/

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rescuer, or an employee under a contract of employment with the insured party under the insurance policy. In a situation such as in the present case, it is for the trial Judge in the Selayang Suit to determine whether the Appellant is covered under the insurance policy by virtue of the fact that he is carried on the lorry by reason of a contract of employment with the 2nd and/or 3rd Respondents, or even if he is not, whether his injuries sustained are covered against the insure person in respect of third party risks arising out of the use of the motor vehicle on a road.

28. In our view, for the present case, it tantamounts to an abuse of the process of the Court for the 1st Respondent to institute the Shah Alam OS for a declaration under s. 96(1) and (3) of the RTA when the Selayang Suit is still ongoing. Any declaration granted by the Sessions Court in the Shah Alam OS would be highly prejudicial to the Appellant should, at the end of the day, the Selayang Suit be decided in the Appellant's favour.

[15] Likewise and since this point has already been pleaded in the suit, I am therefore of the view it is inappropriate that this point is dealt here.

[16] As to the other point that Arumugam a/l Sokalingam, the sole proprietor of the first respondent was already dead at the time of the renewal of the policy, it is not a disputed fact that he died in 2012 but the policy was still renewed on 12 November 2015. The coverage of the policy was from 2 December 2015 to 1 December 2016.

[17] It is clear from the case of *Ammetlife Insurance Berhad v. Nandakumar Appu & Anor* [2016] 5 CLJ 569 that s. 129 and Schedule 9 of the Financial Services Act 2013 came into operation on 1 January 2015 replacing ss. 150 and 151 of the Insurance Act 1996.

[18] Paragraph 5 of Schedule 9 to the Financial Services Act 2013 states as follows:

5. Pre-contractual duty of disclosure for consumer insurance contracts

(1) Before a consumer insurance contract is entered into or varied, a licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.

(2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under subparagraph (1).

(3) Before a consumer insurance contract is renewed, a licensed insurer may either:

(a) request a consumer to answer one or more specific questions in accordance with subparagraph (1); or

(b) give the consumer a copy of any matter previously disclosed by the consumer in relation to the contract and request the consumer to confirm or amend any change to that matter.

A (4) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under subsubparagraph (3)(a), or confirming or amending any matter under subsubparagraph (3)(b).

(5) If the licensed insurer does not make a request in accordance with
B subparagraph (1) or (3) as the case may be, compliance with the consumer's duty of disclosure in respect of those subparagraphs, shall be deemed to have been waived by the insurer.

(6) Where the consumer fails to answer or gives an incomplete or irrelevant answer to any request by the licensed insurer under
C subparagraph (1) or subsubparagraph (3)(a), or fails to confirm or amend any matter under subsubparagraph (3)(b), or does so incompletely or provides irrelevant information, as the case may be, and the answer or matter was not pursued further by the insurer, compliance with the consumer's duty of disclosure in respect of the answer or matter shall be deemed to have been waived by the insurer.

D (7) A licensed insurer shall, before a consumer insurance contract is entered into, varied or renewed, clearly inform the consumer in writing of the consumer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.

E (8) Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.

F (9) Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

[19] It does not seem to be in dispute here that the policy is a consumer
G insurance contract and the applicant did not request the first respondent to answer any question or make any confirmation whatsoever as stipulated in para. 5(3) of Schedule 9 of the Financial Services Act 2013 during the renewal of the policy on 12 November 2015.

[20] According to the first respondent, the applicant must in consequence
H be treated to have waived the requirement of the first respondent's duty of disclosure to inform the applicant that Arumugam a/l Sokalingam is deceased following para. 5(5) of Schedule 9 of the Financial Services Act 2013. Hence and since the policy was renewed by the applicant with payment of premium, the applicant must be prohibited or estopped from contending that the policy is null, void and/or unenforceable.

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[21] There is dearth of cases which dealt with the Financial Services Act 2013 so far and there is presently none that interpreted para. 5 of Schedule 9 thereto. As in all endeavours of interpreting statutes, they must be read literally within the contemplated context; see *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445 FC and *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd* [2014] 3 CLJ 421 FC.

[22] I have carefully read the aforesaid para. 5 of Schedule 9. In my opinion, it applies to consumer insurance contracts on the presupposition that the insurance contract is validly procured in the first instance notwithstanding that there is no express mention of it. This is implicit because it is so fundamental the parties must have legal capacity in the formation of all contracts as provided in s. 11 of the Contracts Act 1950 which reads:

> **11. Who are competent to contract**
>
> Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Otherwise, the contract is void *ab initio*; see *Leha Jusoh v. Awang Johari Hashim* [1977] 1 LNS 59; [1978] 1 MLJ 202 PC.

[23] Hence in the context of an insurance contract, there must be a competent person in existence as insured to procure a valid insurance. Paragraphs 5(1) and 5(3) of Schedule 9 are only then attracted in furtherance of a valid insurance contract to regulate the methodology of communication of risks between the insured and insurer. The object is to enable the insurer to determine the appropriate price and/or terms during the initial procurement and renewal of the insurance respectively.

[24] This is a renewal case and hence only attracted para. 5(3) of Schedule 9. Consequently and since Arumugam a/l Sokalingam was already dead at the material time of the renewal of the Policy, I find and hold that the first respondent could not therefore lawfully renew it. I have similarly in *Pacific & Orient Insurance Co Bhd v. Lim Poh Ewe as the representative of the estate of Lim Eng Hock deceased & 2 Ors* [2017] 1 LNS 585; [2017] 4 AMR 676 held as follows:

> 18. It is trite that the person seeking to insure must be a subsisting natural person or body corporate having insurable interest. I therefore hold that disclosure of the fact of death of the insured who is a natural person is material and mandatory on renewal of any insurance policy previously bought by that person. Non disclosure would thus avoid the renewal of the insurance policy *ab initio*.

As the result, it is immaterial that someone else had renewed the policy purportedly for the first respondent. Accordingly, I hold that the policy herein is void.

[25] I further hold that the combined provisions in para. 5(3) and 5(5) of Schedule 9 of the Financial Services Act 2013 could not be resorted to save the policy notwithstanding that the applicant did not request the first respondent to confirm that Arumugam a/l Sokalingam was alive before renewing the policy. This is because the policy was already void *ab initio* and not merely voidable where para. 5(5) may be used to prohibit or estop the applicant from avoiding the policy for non disclosure of other material information. In other words, it is irrelevant that the applicant did not seek to find out from the first respondent whether Arumugam a/l Sokalingam was alive or not when the policy was renewed.

Conclusion

[26] For the foregoing reasons, I hereby allow the OS with costs of RM5,000.